Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

GLENDA E. WELCH and DOROTHY WELCH,

Petitioners,

v.

TOWN OF MOUNTAIN CITY, GRACE WATTS, CAROLYN HOLT, WILMA MCCRACKIN, DAISY MAE THOMPSON, ROBERT CECIL WELCH and PHYLLIS WELCH BLALOCK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

GARY C. HARRIS
Attorney for Petitioners
Post Office Box 1190
Clayton, Georgia 30525
(770) 351-9050

153317

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

4788

QUESTIONS PRESENTED

I. Is a 42 U.S.C. § 1983 ("§ 1983") plaintiff required to exhaust her state judicial remedies before she is entitled to assert her claim in a federal district court; *i.e.*, have federal district courts in the Eleventh Circuit effectively surrendered their jurisdiction over § 1983 actions to state courts and serve merely to review the decisions of state courts?

II. Is a district court authorized to dismiss a § 1983 action based on *Younger*[1] *abstention* if: (a) none of the respondents asserted *Younger abstention*; (b) the briefs filed by respondents acknowledged that *Younger abstention* had been waived and was "moot;" (c) respondents moved for summary judgment on the merits, without mentioning *Younger abstention*; and (d) the recorder's court enters a written order staying further criminal prosecution by the City pending the district court's adjudication of the merits of the constitutional issues.

III. If *Younger abstention* applies in a case, is the district court authorized to ignore a record replete with evidence that the plaintiff falls within ***all*** of the exceptions articulated in *Younger*; *i.e.*, (a) bad faith prosecution or harassment; (b) prosecution under a facially unconstitutional ordinance; and (c) where petitioner is subject to multiple prosecutions for the same offense?

IV. Does the mere inclusion of a prayer for injunctive relief in a § 1983 action, where a TRO is not sought, negate an otherwise viable attack on a facially unconstitutional ordinance?

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1. *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971).

V. In a § 1983 action is the district court authorized to enter a ***sua sponte*** dismissal without any notice to the plaintiff as analogously required by sundry decisions of this Court interpreting dismissal under Rules 56(c) and 12(b)(6) of the Federal Rules of Civil Procedure?

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Petitioners, Glenda Welch and Dorothy Welch, respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit") rendered in this case.

OPINIONS BELOW

The opinion of the three judge panel of the Eleventh Circuit is not reported. (App. A). The opinion of the Eleventh Circuit on motion for en banc review and reconsideration is not reported. (App. D). The opinion of the United States District Court for the Northern District of Georgia is not published. (App. B).

STATEMENT OF JURISDICTION

The judgment of the Eleventh Circuit was entered on January 15, 1999. (App. A) The Eleventh Circuit denied a timely petition for en banc review/rehearing on March 9, 1999 (App. D). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

This Court is requested to grant certiorari because the Eleventh Circuit "has decided a federal question in a way that conflicts with relevant decisions of this Court" and has sanctioned the district court's departure "from the accepted and usual course of judicial proceedings . . . so as to call for an exercise of this Court's supervisory power."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any . . . ordinance . . . of any State . . . subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

A. Background of the Case

The Town of Mountain City, Georgia, population 784[1], is located in the mountains of northeast Georgia. In 1986, a life-long resident, George Welch, then age 69, was convicted of a double murder of residents of Mountain City and sentenced to life imprisonment in Georgia. In 1994, Beuna Vista Welch, George Welch's wife of 56 years, died. Petitioners are two of the eleven children born to George and Beuna Vista Welch.

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1. 1990 census.

In March 1996, petitioners inquired of the City and county governments if there was any ordinance prohibiting the establishment of a family cemetery and were told by the county commission and the City's mayor that there were none. Relying on this information, petitioners and four of their siblings dedicated the Welch family cemetery located on the family homeplace by recorded deed. On March 8, 1996, a permit was issued to George Welch and Beuna Vista Welch was disinterred from the Blue Heights Baptist Church cemetery and reinterred in the Welch family cemetery.

On July 9, 1996, upon learning that George Welch had terminal cancer, and would soon die and be buried beside his wife, the City council enacted the Burial Ordinance, denominated as "Ordinance Prohibiting Interment of Deceased Persons in Private Cemeteries" ("the ordinance"). The ordinance effectively prohibited petitioners from burying their father next to their mother.

In derogation of Georgia law (OCGA § 50-14-1(d)), petitioners were given no notice of any kind that the council was considering the enactment of the ordinance or that it would vote on the matter on July 9, 1996. On August 1, 8, and 15, 1996, the City published a notice in the legal organ that it was "considering" the enactment of the ordinance, thus failing to give notice ***prior*** to the enactment of the ordinance as mandated by Georgia law (OCGA § 36-35-3).

On July 29, 1996, for the first time, petitioners learned of the enactment of the ordinance. George Welch died on August 1, 1996, at age 80, while still incarcerated. Fearful of paying a fine of $1,000 per day as provided by the ordinance, the local funeral home declined to bury George Welch. On August 4, 1996, petitioners, four of their siblings,

and many of their friends, crafted a wooden casket, purchased a vault, had the body embalmed, dug the grave site with shovels, held a funeral service and buried George Welch next to their mother. The City issued accusations against petitioners on the same day their father was buried.

B. The Proceedings Below

On March 26, 1997, petitioners brought a § 1983 action against the City, et al., alleging the ordinance to be a bill of attainder, facially void of any public purpose and therefore unconstitutional. Further, the complaint alleged that the enactment of the ordinance did not meet constitutional muster on due process and equal protection grounds (no notice or right to be head to petitioners or the public). The complaint sought, inter alia, to have the ordinance declared unconstitutional on sundry procedural and substantive grounds and sought injunctive relief.

On October 3, 1997, counsel for the parties met in chambers with the district court judge whereupon it was agreed that all parties would file motions for summary judgment and the City would cease any further criminal prosecution of petitioners pending a ruling by the district court on various constitutional issues. Pursuant to agreement of counsel, the City recorder's court entered an order on October 23, 1997 staying all further prosecution pending a ruling by the district court on the constitutionality of the ordinance. (App. C, 11a)

By December 3, 1997, all non pro se parties had moved for summary judgment; petitioners had also moved for declaratory judgment. On June 9, 1998, the district court, ***sua sponte***, entered its order summarily dismissing the complaint on the grounds that: (App. B)

1. Petitioners had impermissibly sought injunctive relief of a criminal prosecution in face of the decision of the this Court in *Younger*; (App. B, 7a-9a); and

2. "[P]laintiffs' claims are not yet ripe for this court's review" (*i.e.*, petitioners have not exhausted their state judicial remedies.) (App. B, 10a)

On January 15, 1999, the Eleventh Circuit affirmed the order of the district court without addressing any of the myriad issues raised in the appeal or to explain why:

1. *Younger abstention* was not affirmatively waived.

2. The facts of this case do not fall precisely within ***all three exceptions*** to the *Younger abstention*.

3. For the first time since April 20, 1871, a federal circuit has deferred to a city court the responsibility of enforcing a § 1983 claimant's rights under the federal constitution.

Petitioners timely filed an application for en banc review and reconsideration. On March 9, 1999, the Eleventh Circuit denied petitioners' application in an unpublished decision. (App. D) Petitioners appeal to this Court for relief from the errors committed by the district court and compounded by the Eleventh Circuit affirmance.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE LOWER COURTS ERRONEOUSLY HELD THAT PETITIONERS ARE REQUIRED TO EXHAUST THEIR STATE JUDICIAL REMEDIES BEFORE THEY ARE ENTITLED TO ASSERT A § 1983 CLAIM IN A FEDERAL DISTRICT COURT.

The district court's misconstruction of *Younger*, *supra*, is evinced in its order where it opined:

> In order to award petitioners the relief they seek, this court would have to declare that the Town of Mountain City's Ordinance is unconstitutional. Moreover, this court would have to determine that the state courts are incapable of enforcing the federal constitution in this respect . . . Accordingly, it appears to the court that petitioners' claims are ***not yet ripe for this court's review***. (emphasis supplied)

(App. B, 9a)

In the case at bar, the Eleventh Circuit simply chose to ignore its own controlling criteria for deciding which cases are *ripe for review*. In *Greenbriar, Ltd. v. Alabaster*, 881 F.2d 1570, 1574 (1989), the Eleventh Circuit opined that due process claims are ripe for review "the ***moment*** a governmental decision affecting his [or her] property has been made in a facially arbitrary and capricious manner." (emphasis supplied) It is hard to conceive of a case that

falls more clearly within the ambit of the *Greenbriar* language than the case at bar. It cannot be rationally argued that such disparate decisions promote the principle of stare decisis and public confidence in the continuity of the law.

In sustaining the district court in a two sentence decision, the Eleventh Circuit opined: (App. A, 2a)

> We affirm the district court's decision to invoke the *Younger v. Harris* doctrine and to abstain from exercising jurisdiction in this case. The Recorder's Court for Mountain City is fully capable of passing on the constitutional issues appellants have raised.[2]

Petitioners asked the district court to protect rights accruing to them under the United States Constitution and a ***federal*** statute. Instead of hearing the matter on its merits, the district court ruled that petitioners must look to the recorder's court for protection of their rights under § 1983. How is it presumed that a district court or a federal court of appeals advances justice when they defer the enforcement of federally created rights to a recorder's court or to any other state court? What powers does a recorder's court have to invalidate a town's ordinance on constitutional grounds? Does *Younger* require an aggrieved party to litigate through the state courts, ad nauseam, before she is allowed to seek enforcement of a federal statute in a federal district court? Such a scenario does not supports judicial economy and effectively precludes access to the federal courts of all but the wealthiest persons.

This Court and the Eleventh Circuit have consistently held that exhaustion of state remedies is not a prerequisite

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2. Under Georgia law, a recorder's court judge is not required to be a member of the bar or to have any legal training whatsoever.

to an action under § 1983. *Heck v. Humphrey*, 512 U.S. 477, 480, 114 S. Ct. 2364, 2369, 129 L. Ed. 2d 383 (1994); *Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 501, 102 S. Ct. 2557, 2560, 73 L. Ed. 2d 172 (1982); *Tinney v. Shores*, 77 F.3d 378, 382 (1996); *Majette v. O'Connor, et al.*, 811 F.2d 1416, 1417 (1987).

The Eleventh Circuit simply chose to ignore the binding precedent of the above-cited decisions of this Court, as well as its own. The drastic decision by the district court, affirmed with a two-sentence unpublished decision by the Eleventh Circuit, stands for the proposition that § 1983 actions are to be litigated in the state courts and then brought to the district court for "review,"[3] a procedure not followed in any federal circuit.

II.

THE PETITION SHOULD BE GRANTED BECAUSE *YOUNGER* ABSTENTION WAS AFFIRMATIVELY WAIVED.

Younger abstention is not applicable if the prosecution is being carried out in bad faith, to harass the petitioner, involves multiple prosecutions, or the statute is facially unconstitutional. While the facts of the case at bar easily distinguish it from *Younger*, in any event, petitioners fall within the purview of all of the *Younger abstention* exceptions.

At no time during the fifteen month that ensued from the filing of the complaint on March 26, 1997 and the entry

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3. App. B, 10a.

of the district court's order of dismissal on June 9, 1998, did any defendant refer to *Younger* in any pleading, motion, brief or any other paper. The district court recognized this fact when it opined that ***"[a]lthough several motions are now pending before the court, neither party has addressed Younger abstention."*** (emphasis added) (App. B, 7a)

When counsel met in chambers on October 3, 1997, they agreed that all criminal proceedings would abate pending the district court's ruling on their respective motions for summary judgment which each agreed to file. On October 23, 1997, the recorder's court entered its order staying further prosecution of petitioners pending a ruling by the district court on the constitutionality of the ordinance, citing the agreement between the parties as the basis for its stay of the criminal proceedings. (App. C, 11a) Accordingly, none of the parties saw any need for address *Younger abstention* — it had been waived.

Thus, petitioners could not have anticipated the district court would dismiss petitioners' action on the basis of *Younger abstention*, the very issue which counsel had eliminated from the case in order that it could proceed to address the myriad constitutional issues raised in the complaint.

If *Younger abstention* was not waived, why did respondents go to the trouble and expense of filing two motions for summary judgment seeking adjudication of the constitutional issues on the merits and never mentioning *Younger*? If *Younger abstention* remained as an issue, respondents could have simply moved to dismiss the case at any time during the ensuing 15 months after it was filed.

Standing alone, respondents' respective summary judgment motions seeking a ruling on the merits of the constitutional issues, constitute a waiver of *Younger abstention*. In its summary judgment brief, the City acknowledged that it "[agreed] to abate the Recorder's Court proceeding pending some direction from the Federal District Court." This is the City's euphemistic way of saying that *Younger abstention* had been waived.

Lest this Court have any remaining doubt that respondents waived *Younger abstention* and that its present position is an afterthought, witness the telling quote from page 2 of the City's summary judgment motion brief (filed ***without*** the benefit of hindsight based on the district court's misplaced dismissal order):

> ***As an initial consideration, the request to enjoin the Rabun County Recorder's Court proceedings is a moot issue. All parties have previously agreed to stay the Rabun County Recorder's Court prosecution pending the outcome of the instant litigation.*** (emphasis supplied)

This Court has long recognized that *Younger abstention* is not jurisdictional and that litigants may remove it as an issue. *Brown v. Hotel Employees*, 468 U.S. 491, 500, 104 S. Ct. 3179, 3185, n.9, 82 L. Ed. 2d 373 (1984); *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 479-480, 97 S. Ct. 1898, 1903-1904, 52 L. Ed. 2d 513 (1977); *Sosna v. Iowa*, 419 U.S. 393, 396-397, n.3, 95 S. Ct. 553, 555-556, 42 L. Ed. 2d 532 (1975)

The Eleventh Circuit recognized *Younger abstention* waiver in *Falanga, et al. v. State Bar of Georgia*, 150 F.3d

1333 (11th Cir. (Ga. 1998)) *Falanga* held that an agreement by the litigants to suspend further prosecution by the State Bar of Georgia pending a ruling by the district court on the petitioners' constitutional attack, removed the abstention issue from consideration on appeal. In deciding *Falanga*, the Eleventh Circuit, citing *Benavidez v. Eu*, 34 F.3d 825, 829 (9th Cir. 1994) observed that "Younger abstention is not jurisdictional." There is little protection for litigants when a court is allowed to exercise discretion where it has none. Equal protection mandates consistent application of the law. Petitioners are entitled to the same protection under the law that was afforded Mr. Falanga; this is the essence of equal protection. This Court simply should not allow the Eleventh Circuit to capriciously deny the manifest waiver of *Younger abstention* in this case.

III.

THE PETITION SHOULD BE GRANTED BECAUSE THE LOWER COURTS IGNORED A RECORD REPLETE WITH EVIDENCE THAT THE PETITIONERS FALL WITHIN *ALL* OF THE EXCEPTIONS ARTICULATED IN *YOUNGER*.

In *Younger*, this Court enunciated three exceptions to the abstention principle and petitioners fall within the ambit of all of these exceptions; to wit:

(1) Where the petitioner will be subjected to repeated prosecution for the same offense (*Younger*, 401 U.S. at p. 49);

(2) Where the law is facially unconstitutional (*Younger*, 401 U.S. at p. 50);

(3) Where the petitioner is being harassed or prosecuted in bad faith (*Younger*, 401 U.S. at p. 49).

A. Repeated Prosecutions

Section 2 of the ordinance provides as follows (App. E, 15a):

> Any person, firm or corporation violating any provision of this ordinance shall be fined not more than one thousand dollars for each offense and a separate offense shall be deemed committed on each day during or which a violation occurs or continues.

Thus, petitioners face fines of $1,000 per day for the last two years and nine months, a present total exceeding $2,000,000. More importantly, the ordinance provides that as long as the body remains buried in violation of the ordinance, the offense is continuing. Consequently, there is nothing to prevent Mountain City from prosecuting petitioners ***ad nauseam***, clearly bringing this matter within the ambit of the "repeated prosecution" exception proscribed in *Younger*, 401 U.S. at p. 49.

B. Facial Unconstitutionality

The ordinance is facially unconstitutional and thus, this case falls within the abstention exceptions promulgated in *Younger* at pp. 53-54 and *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611, 95 S. Ct. 1200, 1212, 43 L. Ed. 2d 482 (1975).

An ordinance which does not substantially relate to the public health, safety, morals, or general welfare ***is not*** a

valid exercise of a municipality's police power. *Village of Euclid v. Ambler Realty*, 272 U.S. 365, 387, 47 S. Ct. 114, 71 L. Ed. 303 (1926). An ordinance satisfies this substantive-due-process test if it serves some public purpose, the means adopted by the ordinance are reasonably necessary for the accomplishment of the purpose, and it is not unduly oppressive upon the persons regulated. *Lawton v. Steele*, 152 U.S. 133, 137, 14 S. Ct. 499, 501, 38 L. Ed. 385 (1894); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594, 82 S. Ct. 987, 8 L. Ed. 2d 130 (1962); 1 *Ziegler*, Rathkopf's The Law of Zoning and Planning, Sec. 3.01 [1]; *Stoebuck*, Police Power, Takings, and Due Process, 37 Washington and Lee L. Rev. 1057, 1058 (1980).

The preamble to the ordinance cites two reasons for not allowing the burial of "deceased" persons in private cemeteries with four or less graves; to wit: (App. E, § 1, 14a)

(1) "to prohibit conditions dangerous to the lives of citizens and property owners and detrimental to the health of citizens and public safety caused by interment of deceased persons on private property;" and

(2) "to prohibit any adverse economic effects on future development and to protect future development from effects caused by the creation of cemeteries or the burial of deceased persons upon private property."

During the discovery process, the City admitted:

(1) It never consulted any experts, reviewed any scientific data, or conducted research into the need for the ordinance.

(2) The council did not discuss the merits of the ordinance or offer any amendments prior to the vote.

(3) The council did not discuss the merits of the ordinance, is unaware of the number of cemeteries located within its corporate limits, and has never inspected any cemetery or grave.

1. *Health and Safety*

In order for the ordinance to meet constitutional muster, the City must show that it is not an arbitrary fiat as contended by the petitioners, but that it enhances the legitimate health and safety interests of its citizenry. The law looks to substance — not form; the law looks at what, if anything, an ordinance actually accomplishes for the public good. In judging the constitutionality of an ordinance, the reviewing court is not bound by the laudable verbiage of its preamble.

There simply is no scientific support for the proposition that it is "dangerous" to bury a properly embalmed body in a grave, regardless of where the grave is located or who owns the cemetery. No rational argument can be advanced for the City's proposition that a burial in a church, synagogue or government cemetery is healthier or safer than burial in a private cemetery.

If the City had enacted an ordinance requiring that all bodies be embalmed by a licensed mortician, or that cemeteries be properly maintained, or that funeral processions have police escorts, such an ordinance would constitute a valid exercise of its police powers since these matters legitimately relate to valid health and safety

concerns. But the ordinance simply does not address any such issue or any other legitimate issue related to health or safety. As the unrefuted evidence in the record shows, the ordinance was intentionally calculated to apply only to one existing private cemetery; *i.e.*, the Welch family cemetery.

Under the ordinance, all "established cemeter[ies]" are exempted. An "established cemetery" is defined as "any cemetery existing at the time this ordinance is enacted and containing five graves or more." (App. E, § 1, 15a) Arguendo, if it is dangerous, detrimental or unhealthy to bury ***four*** or less "deceased" persons in a private cemetery, then it rationally follows that burying ***five*** or more "deceased" persons in a private cemetery is even ***more*** dangerous, detrimental or unhealthy. Under the rationale of the ordinance, a private cemetery with four graves poses a health and safety problem, but the problem miraculously dissipates as soon as a fifth grave is added.

Petitioners have attacked the ordinance on the grounds that it is facially whimsical, irrational and arbitrary. Once petitioners demonstrated that the provisions of the ordinance had no rational relationship to the health, safety or economics of the Town of Mountain City, the onus shifted to the City to come forward with evidence that the ordinance "substantially" relates to the health, safety or economics and that the five grave minimum is not arbitrary. *Nasser v. City of Homewood*, 671 F.2d 432, 434 (11th Cir. 1982). The record reflects that the City has not attempted to offer any such evidence.

In reviewing the constitutionality of another ordinance based upon the exercise of municipal police powers, the Georgia Supreme Court wisely opined:

> [a]n ordinance which makes criminal such perfectly normal, acceptable, lawful, innocent and innocuous behavior, is an affront to justice and a total aberration from our concept of ordered liberties.

Bullock v. City of Dallas, 281 S.E.2d 613, 614, 248 Ga. 164 (1981).

The ordinance has no scientific, intellectual or empirical basis; it is transparently arbitrary, and thus, it is an invalid exercise of municipal police powers. The ordinance does nothing whatsoever to promote the welfare of any citizen and the inclusion of the buzzwords "health" and "safety" are meaningless. Substantively, the ordinance is constitutionally dead and no amount of verbal posturing in its preamble can breathe the breath of legitimacy into it.

2. *Economic Development*

According to its preamble, the ordinance is intended "to prohibit any adverse economic effects in future development and to protect future development from effects caused by the creation of cemeteries or the burial of deceased persons upon private property." Obviously, if the creation of a cemetery has an adverse economic influence on the community, it matters not whether the cemetery is owned by a government entity, a "church," a "synagogue," or by private interests.

Under the rationale of the ordinance's preamble, a private cemetery with four or less graves adversely affects the community, but a private cemetery with five or more graves does not adversely effect the community and a

private cemetery with four or less graves adversely affects the community, but a government cemetery or a "church" or "synagogue" cemetery does not adversely effect the community, regardless of the number of graves it has. The ordinance simply does not relate to the general welfare of the City to any degree and thus, is not a valid exercise of a municipality's police power. *Village of Euclid v. Ambler Realty*, 272 U.S. 365, 387, 47 S. Ct. 114, 71 L. Ed. 303 (1926).

C. Bad Faith Prosecution — Harassment

The district court opined "there is no allegation that petitioners have been mistreated in the state criminal proceedings." (App. B, 9a) The complaint succinctly alleges a conspiracy between the mayor, two members of the city council and three private persons to enact a facially unconstitutional ordinance prohibiting the burial of petitioners' father beside their mother in a family cemetery. How much mistreatment should a citizen be expected to tolerate at the hands of government before it rises to the level of "mistreatment." and the judicial system decides to afford her constitutional protection?

In *Gibson v. Berryhill*, 411 U.S. 564, 577-578, 93 S. Ct. 1689, 36 L. Ed. 2d 488 (1973), this Court affirmed a district court's injunction to stop proceedings before a state administrative board on the ground that petitioners had shown bias on the part of the administrative body. *Younger* does not stand for the proposition that citizens whose constitutional rights have been intentionally and blatantly violated by a municipality must wait for a judge employed by that municipality to adjudicate their guilt or innocence before they are authorized to bring an action under § 1983 in a federal district court.

In violation of the Fourteenth Amendment, petitioners are being selectively prosecuted under the ordinance since the City admits to knowing the identity of fifteen other ***active*** participants[4] in the burial of George Welch, but it has taken no steps to prosecute any persons other than petitioners. Selective prosecution is *prima facie* proof of governmental bad faith.

The ordinance is an *ex post facto* law or retroactive law applicable only to an easily identifiable group of people; *i.e.*, petitioners and four of their siblings. Accordingly, the ordinance is a bill of attainder. A bill of attainder is *prima facie* proof of governmental bad faith.

Petitioners have demonstrated that this case falls within the "harassment" or "bad faith" exceptions enunciated in *Younger*. Moreover, petitioners will be not be afforded a jury trial, but will be tried in a town with a population of 784 by a judge who serves at the pleasure of a mayor and two council members who are respondents in this § 1983 action. It is hard to imagine a case which more clearly cries out for adjudication by a neutral court; *i.e.*, a federal district court.

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4. Petitioners furnished the City with photographs depicting the 15 other people actively participating in the burial.

IV.

THE PETITION SHOULD BE GRANTED BECAUSE THE MERE INCLUSION OF A PRAYER FOR INJUNCTIVE RELIEF IN A § 1983 ACTION, WHERE A TRO IS NOT SOUGHT, SHOULD NOT NEGATE AN OTHERWISE VIABLE ATTACK ON A FACIALLY UNCONSTITUTIONAL ORDINANCE.

Assuming arguendo that *Younger abstention* was not waived by respondents, what could be the rationale for the district court's dismissal of the complaint in toto? The interests of justice and judicial economy would be far better served by the dismissal of the sole count of the complaint seeking injunctive relief and leaving intact the constitutional issues set forth in the remaining counts. Why euthanize the patient because one of his arms has to be amputated? Given the liberal construction of pleadings under the Federal Rules of Civil Procedure and the presumption of the sufficiency of pleadings when a plaintiff is confronted with a motion to dismiss or for judgment on the pleadings, how can the dismissal of petitioners' complaint be rationalized.

V.

THE PETITION SHOULD BE GRANTED BECAUSE FUNDAMENTAL DUE PROCESS REQUIRED THE DISTRICT COURT TO GIVE A PLAINTIFF PRIOR NOTICE OF ITS *SUA SPONTE* DISMISSAL.

By analogy to the *sua sponte* entry of summary judgment by the trial court under Rule 56, a district court is required by fundamental due process considerations to alert a plaintiff of its intention to dismiss and to afford her an

opportunity to be heard before taking the drastic step of dismissal. *Massey v. Congress Life Ins. Co.*, 116 F.3d 1414, 1417, 1418 (11th Cir. 1997) This principle of basic fairness has also been applied to *sua sponte* dismissals under Rule 12(b)(6). *Mitchell v. Farcass*, 112 F.3d 1483, 1492 (11th Cir. 1997)

VI.

PROCEDURAL DUE PROCESS VIOLATIONS.

A. No Notice — No Hearing

No notice was given to the petitioners that a ordinance prohibiting the burial of their father next to their mother would be discussed or voted upon at the July 9, 1996 council meeting. When petitioners learned of the ordinance on July 29, 1996, it was a ***fait accompli***. Presumably, 89 years after it was chartered, the City was suddenly experiencing a health and safety crisis brought about by burials in private cemeteries and intended to stop this menace.

Recall that public notice of the council's vote on the ordinance was advertised in the legal organ ***after*** the ordinance was enacted. Although, it is undisputed that the City was aware of the pending burial of George Welch in the Welch family cemetery, the City did not give petitioners any notice that such an ordinance would be voted upon by the council.

> An elementary and fundamental requirement of due process . . . is notice reasonably calculated, under all the circumstances, to apprize interested parties of the pendency of the action and afford them an opportunity to present their objections.

Milliken v. Meyer, 311 U.S. 457, 463, 61 S. Ct. 339, 85 L. Ed. 278 (1940); *accord Grannis v. Ordean*, 234 U.S. 385, 394, 34 S. Ct. 779, 58 L. Ed. 1363 (1914); *Priest v. Board of Trustees of Town of Las Vegas*, 232 U.S. 604, 614, 34 S. Ct. 443, 58 L. Ed. 751 (1914); *Roller v. Holly*, 176 U.S. 398, 409, 20 S. Ct. 410, 44 L. Ed. 520 (1900).

CONCLUSION

By affirming the district's court decision that the case was "not ripe for this court's review," the Eleventh Circuit has adopted the unprecedented position that § 1983 claimants must litigate their federal rights in the state court and that a district court sits merely to "review" the decisions rendered by the state court. The Eleventh Circuit's affirmance of the district court's order is contrary to the controlling decisions of this Court and the Eleventh Circuit cited in this petition.

By agreement of counsel, as well as the recorder's court order staying further criminal prosecution of petitioners pending a ruling by the district court, the parties had obviated the need for the district court to deal with the injunctive issues pending its ruling on the constitutional issues. Yet, the district court choose to ignore this affirmative waiver of *Younger abstention* and proceeded to dismiss petitioners' viable § 1983 action, *sua sponte*, depriving petitioners and on their right to be heard on the matter. Surely *Younger* does not envision this kind of unnecessary dismissal of a viable § 1983 claim. Such a scenario hardly aids in the orderly administration of justice, the promotion of judicial economy or public confidence in the judicial system.

Arguendo, if *Younger abstention* applies, petitioners clearly fall within the ambit of the exceptions this Court enumerated in *Younger*. Petitioners are being selectively prosecuted and harassed in bad faith by the City under a facially unconstitutional ordinance, unrelated to public health, welfare or safety.

Arguendo, if *Younger abstention* applies in this case ***and*** petitioners do not fall within any of the exceptions, justice and judicial economy would be far served by a mere dismissal of the one count seeking injunctive relief, rather than a dismissal of the complaint in toto. Such a dismissal is contrary to myriad controlling law holding that actions should not be dismissed unless there is no legal theory under which the plaintiff can recover. There simply is no rationale for such a draconian result.

By analogy to controlling case law involving the *sua sponte* entry of summary judgment under Rule 56 and dismissals under Rule 12(b)(6), a district court is required by fundamental due process to alert petitioners of its intention to dismiss and to afford them an opportunity to be heard before taking the drastic step of dismissing their case.

Despite the undisputed fact that the City was well aware of petitioners' property rights in their father's body and in their family cemetery, petitioners were given no notice and no opportunity to be heard concerning the ordinance. The City published notice that it was "considering" enactment of the ordinance ***after*** the enactment of the ordinance is contrary to Georgia law, in addition to being false.

The ordinance was enacted for a singular purpose — to prevent the burial of George Welch beside his wife. In

enacting the ordinance, the City sought to visit the sins of a father upon his children. The ordinance is transparently a bill of attainder, directed toward an "easily identifiable group of people;" *i.e.*, petitioners and four of their siblings. The ordinance applies to one cemetery — the Welch family cemetery.

Accordingly, petitioners respectfully urge this Court to grant certiorari.

Respectfully submitted,

GARY C. HARRIS
Attorney for Petitioners
Post Office Box 1190
Clayton, Georgia 30525
(770) 351-9050

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED JANUARY 15, 1999 (PUBLISHED AS 168 F.3d 507 (1999))

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-8775
Non-Argument Calendar

D.C. Docket No. 2:97-CV-036-WCO

GLENDA E. WELCH; DOROTHY WELCH,

Plaintiffs-Appellants

versus

TOWN OF MOUNTAIN CITY; GRACE WATTS; CAROLYN HOLT; WILMA MCCRACKIN, in their representative capacities as mayor and members of the council of the Town of Mountain City, respectively; et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(January 15, 1999)

BEFORE TJOFLAT, ANDERSON and MARCUS, Circuit Judges.

Appendix A

PER CURIAM:

We affirm the district court's decision to invoke *Younger v. Harris* doctrine and to abstain from exercising jurisdiction in this case. The Recorder's Court for Mountain City is fully capable of passing on the constitutional issues appellants have raised.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, GAINESVILLE DIVISION DATED AND FILED JUNE 9, 1998 AND ENTERED JUNE 10, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

CIVIL NO. 2:97-CV-36-WCO

GLENDA E. WELCH and DOROTHY WELCH,

Plaintiffs,

v.

TOWN OF MOUNTAIN CITY; GRACE WATTS, CAROLYN HOLT and WILMA McCRACKIN, in their representative capacities as Mayor and Members of the Council of the TOWN OF MOUNTAIN CITY, respectively; GRACE WATTS, CAROLYN HOLT and WILMA McCRACKIN, in their individual capacities; DAISY MAE THOMPSON, ROBERT CECIL WELCH and PHYLLIS WELCH BLALOCK,

Defendants.

ORDER

The captioned case is before the court for consideration of defendants Town of Mountain City, Grace Watts, Carolyn Holt, and Wilma McCrackin's motion for summary

judgment [21-1], plaintiffs' notion for declaratory judgment and injunctive relief [24-1, 24-2], plaintiffs' motion for summary judgment [25-1], defendants Daisy Mae Thompson and Robert Cecil Welch's motion for summary judgment [29-1], plaintiffs' motion to strike portions of affidavits filed in support of defendants' motions for summary judgment [36-1], plaintiffs' Rule 56(f) motion [37-1], plaintiffs' motion to compel discovery from Daisy Mae Thompson [38-1], plaintiffs' motion to compel discovery from Watts, Holt, and McCrackin [39-1], and plaintiffs' motion to compel discovery from Mountain City [40-1].

Facts

On March 8, 1996, plaintiffs buried a family member on their property located within the city limits of the Town of Mountain City.

On July 9, 1996, the city council of the Town of Mountain City passed the Burial Ordinance which is at issue in this case. The Burial Ordinance provides:

> WHEREAS, the city council of the City of Mountain City, Georgia desires to prohibit conditions dangerous to the lives of citizens and property owners and detrimental to the health of citizens and public safety caused by interment of deceased persons on private property or the establishment of cemeteries on private property; and

Appendix B

WHEREAS, the city council of the City of Mountain City, Georgia hereby desires to prohibit any adverse economic effects on future development and to protect future economic development from effects caused by the creation of cemeteries or the burial of deceased persons upon private property.

NOW THEREFORE, the following ordinance is hereby enacted:

SECTION I

It shall be unlawful for any person, firm, or corporation to establish a cemetery or to bury or inter any deceased person within the city limits except in an established cemetery. The term "established cemetery" shall mean any cemetery existing at the time this ordinance is enacted and containing five graves or more.

This ordinance shall not apply to the following:

a. Creation and establishment of a governmentally owned cemetery or a church or synagogue cemetery or interment in a governmentally owned cemetery or church or synagogue cemetery, or

b. Establishment of or interment in a perpetual care cemetery licensed by the State of Georgia and created pursuant to the provisions of O.C.G.A. Section 44-3-130.

Appendix B

Section 2

> Any person, firm or corporation violating any provision of this ordinance shall be fined not more than one thousand dollars for each offense and a separate offense shall be deemed committed on each day during or which a violation occurs or continues.

Burial Ordinance.

On August 4, 1996, with knowledge that the Burial Ordinance was in effect, plaintiffs, and others, buried another family member on their property. On that same day, Mountain City issued Accusations Nos. 6914 and 6915 charging plaintiffs with a violation of the Burial Ordinance. The accusations were dismissed on October 29, 1996. On December 11, 1996, Mountain City issued Accusations Nos. 97-01-0003 and 97-01-0007 against plaintiffs for violation of the Burial Ordinance.

Defendants represent to the court that the parties have agreed to stay the proceedings in the Recorder's Court for the City of Mountain City pending the outcome of the instant litigation. A copy of the order directing the stay, signed by Judge Russell W. Smith, is attached to defendants' response to plaintiffs' motion for summary judgment.

Plaintiffs filed the instant action against defendants under 42 U.S.C. §§ 1983 and 1988. Plaintiffs assert that they are being denied, under color of law, their constitutional rights accruing to them, under the Fifth, Eighth and

Fourteenth Amendments to the United States Constitution. Plaintiffs move for declaratory judgment and injunctive relief. Plaintiffs move the court to declare substantively that the Burial Ordinance is facially violative of the Fifth and Fourteenth Amendments to the United State Constitution. Plaintiffs further move the court to enjoin Mountain City from prosecuting plaintiffs and from using public funds to defend the individual defendants. Plaintiffs also move for summary judgment on their denial of due process claim, their bill of attainder claim, their "estoppel-vested rights claim," and their selective prosecution claim.

Defendants Town of Mountain City, Grace Watts, Carolyn Holt, and Wilma McCrackin move for summary judgment on all plaintiffs' claims. Defendants Daisy Thompson and Cecil Welch also move for summary judgment on all plaintiffs' claims. Defendant Phyllis Welch Blalock is proceeding pro se and has no motions pending before the court.

The court held a conference in this matter on October 3, 1997. During the conference, the court questioned counsel as to the application of *Younger v. Harris*, 401 U.S. 37 (1971). Although several motions are now pending before the court, neither party has addressed Younger abstention. Because Younger abstention requires federal district courts to abstain from exercising jurisdiction under certain circumstances, the court will address the issue *sua sponte*.

Legal Analysis

Under traditional equitable principles for injunctive relief and in the interest of federal and

> state comity, the Supreme Court established that federal courts should not intervene in an ongoing state criminal prosecution, "when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." *Younger v. Harris*, 401 U.S. 37, 43-44 (1971). This "settled law," intended to preserve the independence of our concurrent judicial systems, requires "our sensitive consideration of ongoing proceedings in state courts" and "that a federal court 'tread lightly' when a state proceeding is already underway." *Blalock v. United States*, 844 F.2d 1546, 1549 (11th Cir. 1988) (per curiam); *Merrill Lynch, Pierce Fenner & Smith, Inc. v. Haydu*, 675 F.2d 1169, 1173 (11th Cir. 1982).

The News-Journal Corp. v. Foxman, 939 F.2d 1499, 1507-08 (11th Cir. 1991).

"Under *Younger v. Harris* and its progeny, federal district courts must refrain from enjoining pending state court proceedings except under special circumstances." *Old Republic Union Ins. Co. v. Tillis Trucking Co., Inc.*, 124 F.3d 1258, 1261 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 1363 (1998). In *Samuels v. Mackell*, 401 U.S. 66, 73 (1971), the Supreme Court extended the principles of *Younger* to apply to declaratory judgments that would effectively enjoin state proceedings. *Id.*

Plaintiffs in this case are currently being prosecuted in the Recorder's Court for the City of Mountain City, State

of Georgia. As stated above, plaintiffs are charged with violations of the Burial Ordinance. Plaintiffs filed the instant action several months after the state court prosecution was commenced. Plaintiffs move this court to enjoin the state court criminal prosecution and declare the statute unconstitutional. The court finds that this case directly implicates the principles of *Younger v. Harris.*

The court has no reason to believe that plaintiffs would not be afforded adequate protection if they raised their constitutional challenge to the Burial Ordinance in the Recorder's Court. Although accusations have been issued against plaintiffs, there is no allegation that plaintiffs have been mistreated in the state criminal proceedings. The court is aware of no procedural barrier which would prevent plaintiffs from raising their constitutional challenge as a defense to the criminal prosecution.

In considering the principles of comity, the court finds that this case involves the exact situation against which *Younger* counsels. In order to award plaintiffs the relief they seek, this court would have to declare that the Town of Mountain City's Burial Ordinance is unconstitutional. Moreover, this court would have to determine that the state courts are incapable of enforcing the federal constitution in this respect.

Accordingly, based upon the foregoing discussion, the court finds that *Younger v. Harris* requires that this court refrain from exercising jurisdiction over plaintiffs, claims for declaratory and injunctive relief.

Appendix B

In considering the remainder of plaintiffs' claims and requests for relief, the court finds that plaintiffs' damages, if any, are undeterminable at this time given the pending criminal prosecution. Accordingly, it appears to the court that plaintiffs' claims are not yet ripe for this court's review.

Summary

Accordingly, the plaintiffs' complaint is hereby DISMISSED pursuant to *Younger v. Harris*. All pending motions are hereby DENIED AS MOOT [21-1, 24-1, 24-2, 25-1, 29-1, 36-1, 37-1, 38-1, 39-1, 40-1].

IT IS SO ORDERED this 9th day of June, 1998.

s/ William C. O'Kelley
WILLIAM C. O'KELLEY
Senior United States District Judge

APPENDIX C — ORDER OF THE RECORDER'S COURT FOR THE CITY OF MOUNTAIN CITY STAYING CRIMINAL PROSECUTION PENDING ADJUDICATION OF THE CONSTITUTIONAL ISSUES BY THE FEDERAL DISTRICT COURT DATED OCTOBER 23, 1997

IN THE RECORDER'S COURT
FOR THE CITY OF MOUNTAIN CITY
STATE OF GEORGIA

ACCUSATION NUMBERS:
97-01-0003, 97-01-0007

CITY OF MOUNTAIN CITY, GEORGIA,

– vs –

GLENDA E. WELCH and DOROTHY HAMRICK
A/K/A DOROTHY WELCH,

Defendant.

ORDER

By agreement of the parties, the above-styled case is continued until such time as an order is issued on the pending Motion(s) for Summary Judgment in the United States District Court a the civil case pending between the parties.

SO ORDERED this 23rd day of October, 1997.

s/ Russell W. Smith, Judge
Pro Hac Vice
Mountain City Recorder's Court

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED MARCH 9, 1999

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 98-8775

GLENDA E. WELCH; DOROTHY WELCH,

Plaintiffs-Appellants,

versus

TOWN OF MOUNTAIN CITY; GRACE WATTS; CAROLYN HOLT; WILMA MCCRACKIN, in their representative capacities as mayor and members of the council of the Town of Mountain City, respectively; et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion, 168 F.3d 507 (1999)).

Before: TJOFLAT, ANDERSON and MARCUS, Circuit Judges.

Appendix D

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
UNITED STATES CIRCUIT JUDGE

APPENDIX E — BURIAL ORDINANCE DATED JULY 9, 1996

ORDINANCE PROHIBITING INTERMENT OF DECEASED PERSONS IN PRIVATE CEMETARIES

The following ordinance is enacted by the city council of the City of Mountain City, Georgia for the purposes of prohibiting the interment and burial of deceased persons on private property or the establishment of a cemetery and said ordinance is enacted as follows:

WHEREAS, the city council of the City of Mountain City, Georgia desires to prohibit conditions dangerous to the lives of citizens and property owners and detrimental to the health of citizens and public safety caused by interment of deemed persons on private property or the establishment of cemeteries on private property; and

WHEREAS, the city council of the City of Mountain City, Georgia hereby desires to prohibit any adverse economic effects on future development and to protect future economic development from effects caused by the creation of cemeteries or the burial of deceased persons upon private property.

NOW THEREFORE, the following ordinance is hereby enacted:

SECTION 1

It shall be unlawful for any person, firm, or corporation to establish a cemetery or to bury or

inter any deceased person within the city limits except in an established cemetery. The term "established cemetery" shall mean any cemetery existing at the time this ordinance is enacted and containing five graves or more.

This ordinance shall not apply to the following:

a. Creation and establishment of a governmentally owned cemetery or a church or synagogue cemetery or interment in a governmentally owned cemetery or church or synagogue cemetery, or

b. Establishment of or interment in a perpetual care cemetery licensed by the State of Georgia and created pursuant to the provisions of O.C.G.A. Section 44-3-130.

SECTION 2

Any person, firm or corporation violating any provision of this ordinance shall be fined not more than one thousand dollars for each offense and a separate offense, shall be deemed committed on each day during or which a violation occurs or continues.

Enacted, on this 9th day of July, 1996

Appendix E

City of Mountain City, Georgia

s/ Grace Watts
Grace Watts, Mayor

Attested to by:

s/ James M. Law
James M. Law, City Clerk